(3)

No. 04-1139

In the Supreme Court of the United States

MARGARET SPELLINGS, SECRETARY OF EDUCATION,
PETITIONER

v.

DEE ELLA LEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Despite the fact that Congress in the Higher Education Act (HEA) has expressly abrogated all otherwise applicable statutes of limitations for collection of student loans, 20 U.S.C. 1091a, the Eighth Circuit has held that the Secretary of Education is barred by the ten-year limitation period under the Debt Collection Act, 31 U.S.C. 3716(e)(1), from collecting defaulted student loan debt by offsetting a portion of the debtor's Social Security benefits. That holding squarely conflicts with the decision of the Ninth Circuit in *Lockhart* v. *United States*, 376 F.3d 1027 (2004), petition for cert. pending, No. 04-881 (filed Dec. 29, 2004), and eviscerates the HEA's abrogation of limitation periods with respect to the collection of student loans by Social Security offset. Because the offset of Social Security benefits is central to the collection of defaulted student

loan debt, the Eighth Circuit's decision clearly warrants this Court's review.

A. The Square Conflict In The Circuits Warrants This Court's Review

1. Respondent concedes that the court of appeals' holding is directly contrary to the Ninth Circuit's decision in *Lockhart*, *supra*, on the question whether the Debt Collection Act's ten-year statute of limitations applies to the collection of delinquent federal student obligations by Social Security offset. Br. in Opp. 7-8; see also Pet. 10-11. Respondent nonetheless argues that the conflict does not merit this Court's review because the decision below and *Lockhart* represent the only two appellate decisions on point. That fact is hardly surprising, however, because the Department of Treasury's offset program was not fully operational with respect to Social Security benefits until 2002. Pet. 5. Moreover, in addition to the published decisions noted by respondent, Br. in Opp. 8, other debtors in unreported cases have objected to Social Security offsets beyond a ten-year period.[1]

Furthermore, now that the Eighth Circuit has issued a published decision holding that the Secretary of Education may not offset Social Security benefits beyond a ten-year period, it is highly likely that debtors residing in the Eighth Circuit and other circuits will rely on the decision below to contest the Secretary's authority to offset Social Security benefits beyond a ten-year period. The scope of the potential problem is

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[1] *Cummins* v. *Department of Educ.*, No. CV-05-478 PHX JAT (D. Ariz. filed Feb. 10, 2005); *Ricketts* v. *Department of the Treasury*, No. IP 02-651-C-Y/K (S.D. Ill. filed Aug. 16, 2002); *Roselli* v. *Department of Educ.*, No. 01-CV-504 (E.D. Va. filed Aug. 7, 2001).

illustrated by the fact that approximately $3.6 billion in delinquent student loan debt is over ten years old. Pet. 13.

Respondent also suggests that either the Eighth Circuit or the Ninth Circuit might revisit their respective decisions. He relies on the fact that the decision below apparently was rendered without regard to *Lockhart* and that neither decision "took a strident position on the issues raised." Br. in Opp. 11. But the Secretary in this case petitioned for rehearing en banc, citing the Ninth Circuit's recent decision in *Lockhart*. The court of appeals nonetheless denied rehearing en banc, declining to revisit its decision in light of the Ninth Circuit's contrary holding. Pet. App. 15a. There is likewise no reason to conclude that the Ninth Circuit will reverse course, because its decision is compelled by the plain language of the HEA. See pp. 6-7, *infra*.

In any event, neither the number of decisions addressing the question presented nor the hypothetical possibility that the circuit conflict may dissipate at some point in the future detracts from the substantial and recurring importance of the question presented for the daily administration of the federal student loan program. The Secretary of Education has a strong interest in the uniform and evenhanded collection of defaulted student loan debt across the nation. Pet. 11. Thus, contrary to respondent's suggestion, the court of appeals' decision merits this Court's review, not just because it places an administrative "burden" on the Secretary (Br. in Opp. 8), but primarily because it creates an inequitable and arbitrary regime in which Social Security benefits are subject to administrative offset based on the happenstance of the judicial circuit in which the debtor resides.

Respondent speculates that some debtors may simply acquiesce in Social Security offsets beyond a ten-year period. Br. in Opp. 8. For those debtors in the Eighth Circuit who *do* challenge such offsets, however, the decision below will be controlling. Accordingly, unless the Court grants review and resolves the present conflict in the circuits, the Secretary's collection efforts will occur on a patchwork and uneven basis.

The court of appeals' decision also warrants the Court's review because it prevents the Secretary from using one of the most effective means to collect defaulted student loan debts. Pet. 12-13. Respondent observes that the decision below does not deprive the Secretary of the ability to collect delinquent student loan debt by means other than administrative offset of Social Security benefits. Br. in Opp. 17. Social Security offsets, however, are often the *only* means of recovering defaulted debt in situations like the present case, in which the debtor has no other source of income and for many years has evaded all other attempts at collection. Pet. 13; see also Pet. App. 7a.

2. Respondent further argues that Congress may resolve the circuit conflict by removing the present ten-year limit on administrative offset in the Debt Collection Act. Br. in Opp. 9-11. She observes that such a result was proposed in an unenacted bill that was introduced in September 2004, and in a bill that was recently introduced in the House. See H.R. 1427, 109th Cong., 1st Sess. (Mar. 17, 2005). The mere introduction of a bill, however, does not eliminate the need to resolve the square conflict in the circuits. There is no indication that the current bill is likely to pass and, empirically, the likelihood of passage of any particular bill is remote. 151 Cong. Rec. D96 (daily ed. Feb. 15, 2005) (resume of

congressional activity during 2003) (table indicating that 198 public bills were enacted into law out of 5704 bills introduced).

Contrary to respondent's suggestion (Br in Opp. 9-10), moreover, the bills were not directed at student loans or the court of appeals' decision. Rather, the bills are much broader in scope. They would remove the ten-year limit for *all* federal agencies and thus would have the effect of extending the HEA's abrogation of statutes of limitations for the collection of student loan debt to the collection of other federal debt by administrative offset. There is therefore no basis for concluding that Congress will pass the bill to overturn the result reached by the court of appeals.

B. The Court of Appeals' Decision Is Incorrect

1. Respondent defends the court of appeals' decision, arguing that the ten-year statute of limitations in the Debt Collection Act, 31 U.S.C. 3716(e), overrides the specific provision in the HEA that removes any statute of limitations for the collection of student loan debt, 20 U.S.C. 1091a. Respondent reiterates the court of appeals' reliance on Section 207 of the Social Security Act, which requires an express reference to Section 207 before Social Security benefits may be subject to administrative offset (42 U.S.C. 407(a) and (b)), and on the fact that the HEA was passed in 1991, before Congress in 1996 expressly made Social Security benefits subject to administrative offsets (31 U.S.C. 3716(c)(3)(A)(i)). Br. in Opp. 12-17. Regardless of the merits of those contentions, this Court's review is warranted because the Ninth Circuit in *Lockhart* has squarely rejected respondent's arguments and has concluded that the Secretary may collect defaulted

student loans by Social Security offsets beyond the ten-year period specified in the Debt Collection Act.

In any event, respondent's contentions are unsound. The plain language of the HEA abrogates all statutes of limitations that would otherwise apply to the collection of student loan debts, including by administrative offset. The HEA thus states that, "*[n]otwithstanding any other provision of [law], * * * no limitation shall terminate the period within which * * * an offset*" can be taken by the government "for the repayment of" educational loans. 20 U.S.C. 1091a(a)(2)(D) (emphasis added). That provision unambiguously bars application of the ten-year limitation that would otherwise apply under the Debt Collection Act, 31 U.S.C. 3716(e). Indeed, respondent acknowledges that the pending proposed bill (which eliminates the ten-year period under the Debt Collection Act) would permit the Secretary to offset Social Security benefits beyond a ten-year period, even though the current bill does not expressly reference Social Security benefits. Br. in Opp. 9-11. It is simply irrelevant that the Social Security Act, 42 U.S.C. 407(a) and (b), requires an express reference to Section 207 before Social Security benefits can be subject to offset. The Debt Collection Act itself contains the requisite express reference indicating that social security benefits are *subject to offset*. 31 U.S.C. 3716(c)(3)(A)(i) ("Notwithstanding any other provision of law (including section[] 207 * * * of the Social Security Act * * *), all payments due to an individual under * * * the Social Security Act * * * shall be subject to offset under this section."). There is no further requirement that modifications to the limitations periods applicable to expressly authorized

offsets themselves include an additional express cross-reference to Section 207.

Nor is it relevant that the HEA was passed before Congress made Social Security benefits subject to administrative offset. The HEA, by its own terms, applies "[n]otwithstanding any other provision of statute, regulation, or administrative limitation," 20 U.S.C. 1091a(a)(2)(D), *i.e.*, the HEA operates without regard to any statute of limitations that would otherwise bar the Secretary from collecting student loan debt. See also 20 U.S.C. 1091a(a)(1) ("It is the purpose of this subsection to ensure that obligations to repay loans and grant overpayments are enforced without regard to any Federal or State statutory, regulatory, or administrative limitation on the period within which debts may be enforced."). Thus, the 1996 amendment to the Debt Collection Act, which was designed to *strengthen* the government's collection efforts by expressly making Social Security benefits subject to offset, cannot be read to *limit* the plain terms of the HEA or to defeat the manifest purpose of Congress to permit the Secretary to collect defaulted student loan debt without regard to any limitation periods.

2. Respondent also argues that the legislative history of the 1996 amendment to the Debt Collection Act indicates that the conferees intended that the government follow "safeguards" before engaging in the administrative offset of Social Security benefits. Br. in Opp. 5-6, 18. But there is no dispute that the Departments of Treasury and Education have fully complied with the "safeguards" mentioned by the conferees, *i.e.*, limiting the amount of benefits subject to offset and implementing procedures to consider exemptions for exceptional hardships. 142 Cong. Rec. 9081-9082 (1996).

Respondent erroneously suggests that one of the "critical" safeguards is the ten-year time limit under 31 U.S.C. 3716(e). Br. in Opp. 18. But nothing in the conference report refers to the ten-year period or suggests that Congress did not intend the plain terms of the HEA to apply when Social Security benefits are offset in order to satisfy the collection of student loans.[2]

C. The Court Of Appeals' Decision Presents An Appropriate Vehicle To Resolve The Conflict In The Circuits

Respondent does not dispute the Secretary's submission that the record is fully developed in this case and there are no obstacles that would prevent this Court from resolving the issue that has divided the circuits. Pet. 8. Instead, respondent argues that *Lockhart* v. *United States*, petition for cert. pending, No. 04-881 (filed Dec. 29, 2004), presents an equally suitable vehicle because "[t]he individuals in this case and *Lockhart* both had student loans outstanding for at least ten years." Br. in Opp. 11. As set forth in the government's response to the petition in *Lockhart* (at 14-16), the Secretary believes that either of these cases would constitute an appropriate vehicle for the Court to resolve the question presented but that this case

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[2] Respondent is correct that the Secretary's records reflect that respondent applied for a disability discharge of her student loan debt but that the Secretary on April 10, 1992, denied her application because her condition had not changed since she incurred her debt in 1978. The statement in the petition (at 13 n.2) was intended to reflect the fact that respondent has not sought a disability discharge since the Secretary began offsetting her Social Security benefits in 2001. As respondent notes (Br. in Opp. 12), respondent remains free to seek a disability discharge if she believes that she can meet the applicable criteria for such relief.

involves a more fully developed record, as well as a determination by both courts below that the ten-year limit under the Debt Collection Act has expired and that the Secretary is barred from utilizing Social Security offsets to collect the defaulted debt. Pet. App. 4a, 14a. By contrast, in *Lockhart*, the record is incomplete in some respects, and the issue whether any of the debtor's loans have been outstanding beyond ten years has never been litigated, much less decided. The Court accordingly may wish to grant review in this case or, in the alternative, to grant review in both cases and consolidate the two cases for briefing and argument. See Pet. 8 n.1 (noting the government's willingness to be realigned as respondent in both cases); see also Reply at 2-3 n.*, *Lockhart*, *supra* (No. 04-881).

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted or, in the alternative, the petition should be held pending the Court's disposition of *Lockhart* v. *United States*, No. 04-881.

Respectfully submitted.

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